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In The

Supreme Court of the United States

October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

ON MOTION FOR LEAVE TO INTERVENE

BRIEF OF DEFENDANT IN SUPPORT OF REPORT OF SPECIAL MASTER ALLOWING INTERVENTION

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JURISDICTION

The original jurisdiction of this court has been invoked, pursuant to Article III, Section 2, Clause 1, of the Constitution of the United States, and 28 U. S. C. § 1251. This court accepted jurisdiction by order dated October 4, 1976.

QUESTION PRESENTED

Whether this court should adopt the report of the Special Master and allow the intervention of the owners of the island in dispute herein in this original action.

STATEMENT

On October 4, 1976, this court accepted jurisdiction of this original action. On November 22, 1976, petitioners for leave to intervene filed a motion for leave to file a complaint in intervention. On December 6, 1976, the Honorable Oren Harris was appointed as Special Master, and the motion for leave to intervene was specifically referred to him. After consideration of the record and briefs submitted by the petitioners and the parties, the Special Master on June 8, 1977, submitted a report and recommendation to this court with the recommendation that an order be entered granting leave to file the complaint in intervention and that the intervenors be designated parties defendant in the case. On July 19, 1977, the plaintiff filed its exception to the Special Master's report taking exception to the recommendation that petitioners be allowed to file their complaint in intervention and be designated parties defendant.

ARGUMENT

The report of the Special Master allowing intervention should be adopted since the petitioners for leave to intervene have shown a compelling interest in the proceeding.

The State of Nebraska recognizes that as a general rule, private parties are not allowed to intervene in an original action involving two sovereign states. It has consistently been recognized, however, that intervention will be allowed where compelling reasons exist to allow

private parties to intervene. It is our belief that the Special Master correctly determined that such compelling reasons exist herein.

In *Kentucky v. Indiana,* 281 U. S. 163, 74 L. Ed. 784, 50 S. Ct. 275 (1930), this court analyzed whether and to what extent private citizens should be allowed to participate as parties in an original action between two states. Indiana and Kentucky entered into a contract to build a bridge over the Ohio River between the two states. Certain citizens and taxpayers of Indiana brought suit in state court to enjoin its officers from carrying out the contract on the ground it was unauthorized and void. Indiana refused to commence performance of the contract until that lawsuit was disposed of. Kentucky then asked leave to file its bill of complaint in an original action before this court against the State of Indiana and the citizens of Indiana who were plaintiffs in the state court lawsuit, seeking to restrain the breach of contract and prosecution of the state court lawsuit and for specific performance of the contract. The court dismissed the citizens of Indiana from the action. In so doing, the court stated as follows:

> "A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters and taxpayers, *merely as such,* of either state, *without a showing of any further and proper interest,* have no separate individual right to contest in such a suit the position taken by the state itself. Otherwise, all the citizens of both states, as one citizen, voter and tax-

> payer has as much right as another in this respect, would be entitled to be heard. . . ." *Id.*, p. 173. (Emphasis added.)

The court relied upon the fact that the individual defendants had not shown any special interest in the lawsuit beyond that of citizens and taxpayers generally, an interest which was properly represented by the State of Indiana.

New Jersey v. New York, 345 U. S. 369, 97 L. Ed. 1081, 73 S. Ct. 689 (1953), involved an original action brought by the State of New Jersey against the State of New York and the City of New York concerning diversion of the waters of the Delaware River. The Commonwealth of Pennsylvania was allowed to intervene. A decree was entered allowing the defendants to divert only a certain amount daily from the river. Pursuant to authority contained in the decree, the City of New York moved for a modification so as to allow diversion of additional quantities of water. The City of Philadelphia requested leave to intervene in the lawsuit. In denying leave to intervene, the court relied chiefly upon the "parens patriae" doctrine, as recognized in *Kentucky v. Indiana, supra*, that the state must be deemed to represent all of its citizens in matters involving a sovereign interest. The court stated that the rule is "a necessary recognition of sovereign dignity as well as a working rule for good judicial administration," *New Jersey v. New York, supra*, p. 373. The court stated further that if the rule were otherwise, the case would be opened to an almost unlimited number of potential intervenors and expanded to the dimensions of a class action, which is not desirable for the

court's original jurisdiction. The court did, however, qualify the general application of the "parens patriae" doctrine by stating that intervention would be allowed if the intervenor could show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state," *Id.*, p. 373. The court then held that Philadelphia had not met that burden and therefore should not be allowed to intervene.

From the foregoing cases, it appears that the test on whether intervention of private parties should be allowed in an original action is two-fold:

(1) Does the intervenor have a compelling interest in his own right beyond that of all other citizens and taxpayers of his state?

(2) If so, is that special interest not properly represented by his state?

In order to be entitled to intervene in an original action, the intervenor must meet both qualifications. In the opinion of the State of Nebraska, the petitioners for leave to intervene have done so.

The Petitioners for leave to intervene, citizens of the State of South Dakota, have an interest different from and greater than all other citizens of the State of South Dakota. The petitioners are record titleholders of the land which is in question. Furhermore, the record establishes that their interest in the lawsuit is *not* adequately represented by the State of South Dakota, under the "parens patriae" doctrine. In fact, their respective interests are diametrically opposed as is evidenced by the

pending lawsuit in the South Dakota state courts between the plaintiff and the petitioners concerning the ownership of the island. As the Special Master found, there is reason to believe that if the island is determined to be within the State of South Dakota, that state would claim title to the lands against the petitioners. In fact, the State of South Dakota has already done so by filing the quiet title action in its state courts. There is no question but that this action could greatly affect the ownership interest of the petitioners. If the island is determined to be within the boundaries of the State of Nebraska, the controversy between the State of South Dakota and the petitioners would be at an end. If, however, the island is determined to be within the State of South Dakota, the petitioners would be in the position of attempting to defend their title against the State of South Dakota's claim under its state law (S. D. C. L. 1967, Section 5-2-4).

It therefore appears that the petitioners for leave to intervene have met the test for being allowed to intervene in an original action. Because of their ownership interest, they do have a compelling interest beyond that of all other citizens and taxpayers of South Dakota. Additionally, it appears that the intervenors' special interest is not properly represented by the State of South Dakota. In fact, their interests are more closely aligned with the State of Nebraska. However, a "parens patriae" relationship does not exist between the State of Nebraska and the petitioners, and the State of Nebraska does not feel it should be placed in the position of representing the interests of South Dakota citizens against their own state in any manner, no matter how slight. Finally, this is not a case in which the allowance of these petitioners to inter-

vene would open the lawsuit to a multiplicity of potential intervenors; and, as was determined by the Special Master, the intervention will not unduly delay or prejudice the rights of the original parties since the intervenors' claims and defenses as to major questions of law or fact are in common with those asserted by the State of Nebraska.

Parties other than sovereign states have been allowed as parties in an original action between two states on other occasions. One obvious example is in *New Jersey v. New York, supra,* wherein the City of New York was made, and allowed to participate as, a party defendant. Even more relevant to this case, however, is *Oklahoma v. Texas,* 253 U. S. 470, 64 L. Ed. 1017, 40 S. Ct. 580 (1920), wherein this court entered the following order without an opinion in an original action involving a boundary dispute:

> *"Order Granting Leave to File Petitions in Intervention.*
>
> "The motions of the Judsonia Developing Association, Burk Divide Oil Company No. 2 and Others, Burk Divide Oil Company No. 3 and others, and Mellish Consolidated Placer Oil Company, for leave to file petitions in intervention herein, are hereby granted; and similar leave is granted to any and all other parties claiming any title to or interest in the lands in the possession of the Receiver herein by virtue of the orders of April 1, 1920, and June 7, 1920."

CONCLUSION

The report of the Special Master should be adopted and petitioners for leave to intervene should be allowed

to intervene as parties defendant in this case because they possess a compelling interest in this lawsuit which is not represented by the State of South Dakota. Allowing the intervention would not hinder or delay the progress of the lawsuit or in any way prejudice the rights of the present parties.

Respectfully submitted,

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